IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 147 of 2007
In
COMPANY APPLICATION No. 166 of 2007
In
OFFICIAL LIQUIDATOR'S REPORT No. 166 of 2006
with
CIVIL APPLICATION No. 241 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **YES**

2 To be referred to the Reporter or not ? **YES**

3 Whether their Lordships wish to see the fair copy of the judgment ? **NO**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **NO**

5 Whether it is to be circulated to the Company Judge ? **YES**

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MAK BUSINESS ENTERPRISE PVT. LTD. - Appellant(s)
Versus
O.L. OF AMBICA MILLS LTD. - Opponent(s)

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Appearance :
MR MIHIR JOSHI with MR PAVAN S GODIAWALA for Appellant(s) : 1,
MR JS YADAV for OFFICIAL LIQUIDATOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 05/07/2007
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

Admit.

Mr.J.S.Yadav, learned Counsel waives service of notice of admission on behalf of the Official Liquidator. In the facts and circumstances of the case, the appeal is taken up for final disposal today.

2. This appeal is directed against the judgment and order dated 9.5.2007 of the learned Company Judge dismissing Company Application No.166 of 2007, which was filed by the appellant herein for a direction to the Official Liquidator to execute sale deed in respect of the property in question in favour of the present appellant for a sale consideration of Rs.7.35 crores which was already paid by 24.4.2007 pursuant to the previous order dated 28.12.2006 of the same learned Company Judge.

3. Shree Ambica Mills Ltd. went into liquidation and its assets were put up for sale. The Company's office premises at 122 Maker Chambers, VI, Nariman Point, Mumbai were put up for sale through a public advertisement as per the direction of the Company Court in Company Application No. 66 of 1988. The valuation report indicated that the property was worth Rs.4.10 crore. Thereafter, at the time of physical inspection on 10.2.2006 the property was valued at Rs.4.55 crores. Bids were invited and the highest offer received by the Official Liquidator was Rs.5.95 crores. The Official Liquidator accordingly submitted Official Liquidator's Report No.166 of 2006 seeking direction for confirmation of sale in favour of M/s.Pacific Corporate Services Ltd., for purchase consideration of Rs.5.95 crores. At the hearing of said OL Report, M/s. Mak Enterprises appeared through their learned advocate Mr. Pavan Godiawala and expressed readiness and willingness to offer more than Rs.6.20 crores. The Company Court permitted the said firm to deposit earnest money deposit of Rs.40 lacs and further sum of Rs.5 lacs as late fee charges. The Company Court then permitted the bidders to proceed for inter se bidding. In fact, another party, Dilip

H. Udani had also expressed his willingness to offer Rs.6.20 crores but when it came to deposit of Rs.40 lacs as EMD and late fee charges of Rs.5 lacs on or before 28.12.2006, the said party backed out. Therefore the bidding took place only between M/s. Pacific Corporate Services Ltd., and M/s. Mak Enterprises. In the said bidding M/s. Mak Enterprises made the highest offer of Rs.7.35 crores and the Company Court held that there could be no objection in accepting the offer of M/s. Mak Enterprises and confirmed the sale in its favour. With regard to property in question, the Company Court passed order dated 28.12.2006 confirming the sale in favour of M/s. Mak Enterprises for a sum of Rs.7.35 crores with several terms and conditions, some of which were as under :-

(i) the purchaser shall pay development and improvement fund for the property in question which was quantified at Rs.6.75 lacs and also other charges like car parking etc.

(ii) the purchaser shall pay 25% of the purchase consideration within one month and the balance amount shall be paid within three months. Thereafter, the earnest money deposited by the purchaser be adjusted in the last installment.

(iii) the stamp duty, registration charges and all other incidental charges were also to be borne by the purchaser.

(iv) the property shall be handed over to the purchaser on payment of full sale consideration to the Official Liquidator.

(v) No nomination shall be permitted.

4. Accordingly, M/s. Mak Enterprises paid Rs.1,83,75,000/- on 25.1.2007 and the balance amount of Rs.5,11,25,000/- was paid to the Official Liquidator on 24.4.2007. In the meantime on 4.4.2007 the appellant preferred Company Application No.166 of 2007 specifically pointing out, inter alia as under :-

(i) the Mak Enterprises, partnership firm consisting of two partners was the highest bidder for the Lot No.1 being office at 122, Maker Chambers, VI, Nariman Point, Mumbai.

(ii) After referring to confirmation of bid in favour of the Mak Enterprises for the amount of Rs.7.35 crores, the appellant stated as under :-

> "3. Thereafter upon induction of new partners fresh deed was made on 17th day of February, 2007. The copies of partnership deed dated 18th December, 2006 and partnership deed dated 17th February, 2007 are marked as Annexure "B" collectively."

After referring to the payment of 25% sale consideration by Demand Draft dated 22.1.2007, the appellant made the following averments in paragraphs 5 and 7 :-

> "5. Meanwhile the said partnership firm got converted in to Part IX Company and hence the present application is preferred before the Hon'ble Court for necessary direction to the Official Liquidator to accept the remaining amount of Rs.5,11,25,000/- (Rupees Five Crore Eleven Lacs Twenty Five

Thousand) from the present applicant. A copy of the Memorandum and Articles of Association are marked as Annexure “C”.

7. I say that, to incorporate the partnership firm into part IX Company, the other partners were inducted and fresh deed was executed. At least 7 (seven) partners would be required and thereafter the firm was converted and registered into part IX Company. All the seven partners have to be subscribers to the memorandum of association and hence the said partners are the subscribers to the Memorandum of Association.”

It was then pointed out that the seven partners expressed their desire vide Resolution dated 23.2.2007 to register the firm as a Limited Company within the meaning of Section 565/566 of the Companies Act, 1956. The Memorandum of Association and the Articles of Association of the newly formed Company i.e. the appellant Company were also placed and produced as annexure to the Company Application.

5. The application came to be heard on 30.4.2007 and the learned Company Judge pronounced the order allowing the application (i.e. directing the Official Liquidator to execute the sale deed in favour of the appellant) and detailed order was to be passed subsequently. However, at the time of dictating the order, “on going through the supporting documents and the annexures annexed with the application alongwith the affidavit in support of the Judges Summons”, the learned Company Judge found that the partnership firm (with seven partners) converted into the Joint Stock Company was not the same firm with two partners in whose favour the sale was confirmed on 28.12.2006. The learned Company Judge passed strictures against the learned advocate for

misleading the Court that the same partnership firm with the same partners, who were there at the time of confirmation of sale, was converted into Part IX Company. On 8.5.2007 the learned Company Judge notified the matter for further hearing on 9.5.2007 and on that day the learned Company Judge passed the impugned order giving rise to the present appeal, rejecting Company Application No.166 of 2007 and passing strictures against the learned advocate for the appellant Company for misleading the Court. It is against the above order that the appellant Company has preferred this appeal.

6. Mr. Mihir Joshi with Mr.Pavan S. Godiawala, for the appellant Company has vehemently submitted that the learned Company Judge has not at all considered and appreciated that "the supporting documents and the annexures with the application alongwith the affidavit in support of the Judges Summons" did reveal the following facts :-

The partnership firm in whose favour the sale was confirmed by order dated 28.12.2006 consisted of two partners **Mr. Khalid Shoukatali Chowdhary** and **Mr. Asif Ismail Potia.** The partnership deed at Annexure-B to the Company Application revealed that their share was 50% each. In the Company Application No.166 of 2007 filed by the appellant Company it was clearly pointed out that a limited Company has to have minimum seven share holders and, therefore, the partnership firm of M/s. Mak Enterprises having only two partners was required to induct five more partners. Share in profit and loss of the original two partners was 45% + 45% = 90% and subsequently inducted five partners were given nominal share of only 2% each. As stated in the partnership deed dated 17.2.2007 (Annexure-B collectively), the names and addresses of two existing partners and the five newly inducted partners and their share in profit and loss were as under :-

Sr.No.	Name of the member	Share in Profit and loss
1	Mr. **Khalid** Shoukatali **Chowdhary**, Crystal Tower, 12th Floor, Flat No.1202, M.T. Ansari Marg, 14, Arab Lane, Grant Road, Mumbai – 400 008.	45%
2	Mr. Asif **Ismail Potia**, Ratan Apartment, Flat No. 4, Plot No. 6/3, Samarth Ramdas Marg, 10th Road, JVPD Scheme, Vile Parle (West), Mumbai – 400 049.	45%
3	Mr. Mohammed **Iqbal Khan** 101, Morusadan, S.V.Road, Santacruz (West), Mumbai – 400 054.	2%
4	Mr. Imran **Iqbal Khan**, 101, Morusadan, S.V.Road, Santacruz (West), Mumbai – 400 054.	2%
5	Mr. Rashid **Khalid Chowdhary**, Crystal Tower, 12th Floor, Flat No.1202, M.T. Ansari Marg, 14, Arab Lane, Grant Road, Mumbai – 400 008.	2%
6	Mr. Shahid **Khalid Chowdhary**, Crystal Tower, 12th Floor, Flat No.1202, M.T. Ansari Marg, 14, Arab Lane, Grant Road, Mumbai – 400 008.	2%
7	Mr. Salim **Ismail Potia** Ratan Apartment, Flat No. 4, Plot No. 6/3, Samarth Ramdas Marg, 10th Road, JVPD Scheme, Vile Parle (West), Mumbai – 400 049.	2%
	Total	100%

Thereafter, this reconstituted partnership firm has been converted into joint stock company under Part IX of the Companies Act, 1956 and their shareholding in the said Company also remains in the same proportion (as their share in the partnership firm) as indicated in the Memorandum of Association on the record before

the learned Company Judge:-

		Value of Shares Rs.	No. of shares of Rs.10 each
1	Mr. **Khalid** Shoukatali **Chowdhary**	4,50,000	45,000
2	Mr. Asif **Ismail Potia**	4,50,000	45,000
3	Mr. Mohammed **Iqbal Khan**	20,000	2,000
4	Mr. Imran **Iqbal Khan**	20,000	2,000
5	Mr. Rashid **Khalid Chowdhary**	20,000	2,000
6	Mr. Shahid **Khalid Chowdhary**	20,000	2,000
7	Mr. Salim **Ismail Potia**	20,000	2,000
	Total	10,00,000	1,00,000

7. Mr. Joshi has, therefore, submitted that the entity which had requested for execution of the sale deed in its favour for all intent and purposes was the same entity which had made the highest offer of Rs.7.35 crores and which offer was accepted by the learned Company Judge on 28.12.2006. It is submitted that the learned Company Judge erred not only in not taking into account the above salient facts already on record, but also erred in not taking into consideration the fact pointed out by Mr Godiawala on the date of rehearing on 9.5.2007 that the subsequently inducted five partners were close relatives of the two original partners as under :-

S.No.	Name of Partners	
1.	Mr **Khalid** Shoukatali **Chowdhary**, residing at Crystal Tower, 12th Floor, Flat No. 1202, M.T. Ansari Marg, 14, Arab Lane, Grant Road, Mumbai – 400 008.	Original partner
2	Mr Afif **Ismail Potia**, residing at Ratan Apartment, Flat No. 4, Plot No. 6/3, Samarth Ramdas Marg, 10th Road, JVPD Scheme, Vile Parle (West), Mumbai – 400 049.	Original partner

3	Mr. Mohammed **Iqbal Khan**, residing at 101, Morusadan, S.V. Road, Santacruz (West), Mumbai – 400 054.	Partner No.3
4	Mr. Imran **Iqbal Khan**, same address as of partner No.3	Son of partner No.3
5	Mr. Rashid **Khalid Chowdhary**, same address as of partner No.1	Son of partner No.1
6	Mr Shahid **Khalid Chowdhary** same address as of partner No.1	Son of partner No.1
7	Mr Salim **Ismail Potia** same address as of partner No.2	Brother of partner No.2

It is also submitted that the learned Company Judge erred in passing strictures against the learned advocate for the appellant Company who appeared before the learned Company Judge.

8. On the other hand Mr.J.S.Yadav, learned counsel appearing for the Official Liquidator has opposed the appeal and submitted that since the order dated 28.12.2006 specifically provided that no nomination shall be permitted and since the highest offer of Rs.7.35 crores was made by M/s. Mak Enterprises, a partnership firm consisting of two partners, the learned Company Judge was justified in rejecting the request for executing the sale deed in favour of joint stock company having seven share holders.

9. Having heard learned advocates for the parties, we find considerable substance in the submission made on behalf of the appellant Company that the two partners of partnership firm – M/s. Mak Enterprises which had made the highest offer of Rs.7.35 crores (which offer was accepted by the learned Company Judge on 28.12.2006) subsequently also continued to have substantial controlling interest of 90% in the reconstituted partnership firm with seven partners and continued to have the same shareholding –

90% - in the newly formed joint stock Company, which has been converted from a partnership firm having seven partners. We are satisfied that the five other partners inducted in the partnership firm on 17.2.2007 were close relatives of the original partners and were given only nominal share of 2% each for the purpose of reconstituting the firm as having seven partners for the purpose of converting the firm into a joint stock Company under Section 565/566 of the companies Act. Hence, to all intent and purposes and in sum and substance the appellant Company which had requested for execution of the sale deed in its favour was the same entity which had made the highest offer of Rs.7.35 crores and which offer was accepted by the learned Company Judge dated 28.12.2006.

10. At this stage, we may refer to the reasoning, which appealed to the learned Company Judge for taking a very harsh view on the appellant Company and its learned advocate. The learned Company Judge has observed that the sale deed / conveyance deed was required to be executed only in favour of M/s. Mak Enterprises on payment of sale consideration with an object and purpose to see that there is no loss of stamp duty to the State Government.

11. In the peculiar facts and circumstances of the case, in view of our finding that the M/s. Mak Business Enterprises Pvt. Ltd., is for all practical purposes a business entity owned and controlled by original partners of M/s. Mak Enterprises which had made the highest offer of Rs.7.35 crores on 28.12.2006, it may not have been strictly necessary to deal with the above observation made by the learned Company Judge. However, having regard to the practical realities of the business world with which the Company Court has to deal with day in and day out, and that the Company Court has to deal with this aspect in all Court auction sales, we cannot help expressing the view that there need not be absolute embargo on

such nomination facility. Nomination facility is being allowed by this High Court exercising jurisdiction under the Companies Act for the last many decades. This Court can take judicial notice of the fact that the ultimate purchasers of the property or the end-users generally do not themselves participate in such auction sales and in any case, never in large numbers. It may be on account of the delays in the Court proceedings or uncertainties in such proceedings or any other reason that the end-users may be shying away from Court auction sales, but the fact remains that a number of persons dealing in plant and machinery or real estate do participate in such auction sales. If the nomination facility were to be prohibited altogether, the number of parties participating in the Court auction sales would considerably go down. This would not be in the interest of ultimate beneficiaries i.e. secured creditors and workmen who are ordinary the only persons getting share of the sale proceeds.

12. Assuming that nomination facility is likely to result into loss of stamp duty to the State (the intricacies of the relevant provisions of the Companies Act and the Stamp Duty Act have not been examined by us and, therefore, we would not like to express any opinion either way, but even proceeding on that basis and considering the rates of stamp duty and registration charges presently prevailing), this aspect can be suitably taken care of by providing a disincentive to the auction purchaser who wants to avail of the nomination facility. This may be done by imposing a condition like – if the sale deed/conveyance deed is to be executed in favour of a nominee, the auction purchaser/nominee shall have to pay additional 10% to the Official Liquidator as additional purchase consideration for buying the concerned property put up for sale. One cannot lose sight of the fact that the ultimate beneficiaries of the higher price are ordinarily only secured creditors and workmen. Since secured creditors are generally public financial

institutions or public sector banks and workers belong to the lower socio economic strata of the society, we do not expect the Government to grudge additional 10% price going to the secured creditors and the workers, when the conveyance is to be executed in favour of the nominee of the auction purchaser.

13. We have noticed in a few cases that the Company Court does not favour the provision of nomination facility. However, practice of granting such facility, which is an established practice of this Court for the last several decades, need not be abrogated abruptly. This is not to say that a practice or convention of an institution can never be discontinued or changed. However, when such practice or convention merely needs some improvement or fine tuning exploring better alternatives for improving upon the existing practice/convention or evolving a new one is what one should strive for and not to look down upon such practice or convention. We also make it clear that such a condition requiring the purchaser or nominee to pay additional purchase consideration can only be incorporated in the Terms and Conditions of Sale being prepared at the time of inviting the bids, but not at a later stage after opening the bids or after the inter-se bidding.

14. In any view of the matter, in the facts and circumstances of the case, we are not inclined to impose any such condition for the simple reason that the two original partners of M/s. Mak Enterprises (the auction purchaser) continued to have 90% controlling interest in the newly formed company, converted from partnership firm comprising of seven partners including the same two partners having 90% share and the five others who are not only close relatives of the original partners but also have only nominal share of 2% each (as a partner in the erstwhile firm and shareholder in the Company).

15. In view of the above discussion, we allow the appeal, set aside the order dated 9.5.2007. We also expunge the remarks made by the learned Company Judge in the above order against learned advocate Mr.Pavan S. Godiawala, for the appellant Company.

We further allow Company Application No.166 of 2007 and direct the Official Liquidator that in view of full payment of Rs.7.35 crores by the M/s. Mak Enterprises/appellant Company to the Official Liquidator, as per the order dated 28.12.2006 (about which fact there is no dispute), the Official Liquidator shall execute the sale deed / conveyance deed in favour of the appellant Company within one month from today for the property in question being 122 Maker Chambers, VI, Nariman Point, Mumbai.

16. Since the appeal is allowed, the Civil Application No.241 of 2007 does not survive and is disposed of accordingly.

(M. S. SHAH, J.)

(K. A. PUJ, J.)

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